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In the

Supreme Court of the United States

GELEAN MARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THERE SHOULD BE UNIFORM FACTORS CONSIDERED WHEN DETERMINING WHETHER A CONSPIRACY IS A SINGLE CONSPIRACY OR A MULTIPLE CONSPIRACY IN ORDER TO AVOID ABUSE OF AND ENSURE UNIFORM PROTECTION UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1, the undersigned counsel hereby certifies that the following listed persons and parties have an interest in the outcome of this case. These representations are made so the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of court.

1. **GELEAN**, Mark
   Defendant/Appellant/Petitioner

2. **GOMEZ**, Honorable Curtis V.
   United States District Court Judge

3. **KING, Robert L.**
   Trial and Appellate Counsel for Petitioner

4. **SMITH, Delia**
   AUSA/ Counsel for Respondent

With respect to this Appeal, there are no corporate entities for purposes of disclosure.

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In The
Supreme Court of the United States

GELEAN MARK,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a *writ of certiorari* issue to review the decision rendered by the Third Circuit Court of Appeals on July 8, 2008, which denied Petitioner's appeal.

The Third Circuit has entered a decision in this case that clearly shows the conflict in double jeopardy jurisprudence and calls for an exercise of this Honorable Court's supervisory power.

OPINION BELOW

The opinion by the Third Circuit Court of Appeals was an unpublished opinion. Reference to the opinion is thereby limited to the following: ***United States v. Gelean Mark***, No. 08-1518 (3rd Cir. 2008). The opinion is reproduced in the Appendix hereto at A-1.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Third Circuit on July 8, 2008 denying Petitioner's appeal.

Pursuant to 28 U.S.C. § 1254(1), which provides in relevant part that "cases in the courts of appeals may be reviewed by the Supreme Court" "by writ of certiorari," this Court has jurisdiction to hear this case.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment – "No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

On October 6, 2005, Petitioner was indicted in an 18-count indictment in the Virgin Islands. This indictment charged a conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana and conspiracy to import cocaine and cocaine base. This indictment is known as "Redball I."

On December 19, 2006, a second 14-count indictment was issued against Petitioner alleging a different conspiracy to possess and distribute cocaine and conspiracy to import cocaine. This indictment is known as "Redball II."

The jury trial in Redball I began on March 5, 2007 and ended in a mistrial on March 27, 2007 based on a deadlocked jury. The jury trial in Redball II began on September 5, 2007 and the jury returned a partial verdict finding Petitioner guilty on Count I, the conspiracy to possess with intent to distribute count.

The government, after obtaining a conviction against Petitioner on Redball II, was seeking to retry Petitioner on Redball I. On January 28, 2008 Petitioner filed a motion to dismiss Count I of the Redball I indictment arguing that his conviction on Count I of the Redball II indictment barred his reprosecution on the Redball I indictment on Double Jeopardy grounds. The district court denied the motion.

A timely Notice of Appeal was filed for Petitioner. Jurisdiction in the Third Circuit Court of Appeals was proper pursuant to 28 U.S.C. §1291. On appeal, Petitioner raised the following issue:

(1) Whether the double jeopardy clause of the United States Constitution prohibits the prosecution in the instant case because of a substantially identical prosecution under a separate indictment.

As this Petition for Writ of Certiorari is timely submitted, the issues herein are properly before this Honorable Court and should be heard as this case presents an important question that calls for an exercise of this Court's supervisory power.

ARGUMENT FOR ALLOWANCE OF THE WRIT

WHETHER THERE SHOULD BE UNIFORM FACTORS CONSIDERED WHEN DETERMINING WHETHER A CONSPIRACY IS A SINGLE CONSPIRACY OR A MULTIPLE CONSPIRACY IN ORDER TO AVOID ABUSE OF AND ENSURE UNIFORM PROTECTION UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

Double Jeopardy, as a constitutional protection should present consistent factors in application when considering whether a Petitioner has been previously tried for a conspiracy or whether the government has established the conspiracy alleged. Petitioner will compare the application of double jeopardy protections in challenges to subsequent indictments and variance challenges. Ultimately, Petitioner will show why identical factors should be applied when asking what activity constitutes a single conspiracy and ask this Honorable Court to determine what those consistent factors should be.

A. Double Jeopardy

Under the Double Jeopardy Clause of the Fifth Amendment, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969). In *Blockburger v. United States*, 284 U.S. 199, 76 L. Ed. 306, 52 S. Ct. 180 (1932) this Court held that the Double Jeopardy Clause does not bar consecutive prosecutions for a single act if each charged offense requires proof of an element that the other does not.

The *Blockburger* test has become known as the "same evidence test" and almost every Circuit Court of Appeals has concluded that this test should not be applied to conspiracy cases on the basis that the government would be able to circumvent the test by establishing different overt acts.[1] The Tenth Circuit appears to be the only Circuit to have directly concluded that the *Blockburger* test should be

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[1] *United States v. Chagra*, 653 F.2d 26, 29 (1st Cir. 1981), *cert. denied*, 455 U.S. 907, 102 S. Ct. 1252, 71 L. Ed. 2d 445 (1982); *United States v. Booth*, 673 F.2d 27, 29 (1st Cir. 1982); *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir. 1985); *United States v. Macchia*, 35 F.3d 662, 667-68 (2d Cir. 1994); *United States v. Liotard*, 817 F.2d 1074, 1078 (3d Cir. 1987); *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978); *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983); *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *United States v. McClelland*, 62 F.3d 265, 267 (8th Cir. 1995); *United States v. Arbelaez*, 719 F.2d 1453, 1458 (9th Cir. 1983); *United States v. Nyhuis*, 8 F.3d 731, 736 (11th Cir. Fla. 1993).

applied to conspiracy cases, albeit with different terms then "same evidence."[2]

The Circuit Courts that have decided that *Blockburger* does not adequately protect a defendant's double jeopardy rights in conspiracy cases have all developed factors that should be considered when analyzing whether charged conspiracies are the same or different conspiracies. These factors are inconsistent yet present a need to be consistent when applying the underlying evidence of an individual case to the factors to be considered.

The Third Circuit has explained that the "factor" test is necessary because "successive indictments against a single defendant for participation in a single conspiracy might withstand same evidence scrutiny if the court places undue emphasis upon the evidence used to prove the commission of the overt acts alleged."[3] The Circuits apply these factors when, as in Petitioner's case, a defendant is indicted separately for two conspiracies which he alleges are the same.

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[2] *United States v. Puckett*, 692 F.2d 663, 668 (10th Cir. 1982)(While we adhere to the same evidence test, we recognize that it has been criticized in recent years as an inadequate measurement of double jeopardy when applied to multiple prosecutions for conspiracy charges); *United States v. Mintz*, 16 F.3d 1101, 1104 (10th Cir. 1994)(In a double jeopardy analysis involving conspiracies, the court must determine whether the two transactions were interdependent and whether the Defendants were "united in a common unlawful goal or purpose.")

[3] *United States v. Liotard*, 817 F.2d 1074, 1078 (3rd Cir. 1987).

All Circuits that apply the factor test agree that the time the alleged conspiracies occurred and the people involved, whether indicted or unindicted, are relevant considerations in determining whether the conspiracies at issue occurred during the same period of time.[4] All Circuits also examine the evidence used to establish the conspiracies in terms of the similarity of the conspiracies and the overt acts, albeit using different terminology.[5] Other

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[4] FN 1, *supra.*

[5] *United States v. Chagra*, 653 F.2d 26, 29 (1st Cir. 1981), *cert. denied,* 455 U.S. 907, 102 S. Ct. 1252, 71 L. Ed. 2d 445 (1982)(whether the same evidence was used to prove the two conspiracies); *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir. 1985)(similarity of operation, the existence of common overt acts, and common objectives); *United States v. Liotard*, 817 F.2d 1074, 1078 (3d Cir. 1987)(similarity of overt acts); *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986)(the overt acts or any other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978)(the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case); *United States v. Sinito*, 723 F.2d 1250, 1256 (6th Cir. 1983)(the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case); *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980)(whether the conspiracies involve the same overt acts); *United States v. McClelland*, 62 F.3d 265, 267 (8th Cir. 1995)(the nature and scope of the activity charged); *United States v. Arbelaez*, 719 F.2d 1453, 1458 (9th Cir. 1983)(nature of the scheme, frequency, and duration of each conspirator's transactions, and the commonality of goals); *United States v. Nyhuis*, 8 F.3d 731, 736 (11th Cir. Fla. 1993)(the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case).

factors include the geography of the conspiracy, which is considered in every circuit except the Ninth, the statute charged, considered in seven Circuits, the objectives of the conspiracies, considered in the Second and Ninth Circuits. The interdependence of the conspiracies, considered in the Second and Seventh Circuits and, finally, the role of the defendant, considered in the Third Circuit.

The application of these factors frequently results in a finding of separate conspiracies.[6] While, as presented below, when factors are applied in a variance challenge they more often result in the finding of a single conspiracy. When considering whether one conspiracy exists or more than one there should be consistent standards applicable to ensure that a defendants double jeopardy rights are uniformly protected.

The question is the same: How many conspiracies exist? Therefore the double jeopardy and variance factors should be interchangeable so as to produce similar results. However, the current factors among the circuits are inconsistent and so diverse as to

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[6] *See* for example *United States v. Booth*, 673 F.2d 27(1st Cir. 1982); *United States v. Korfant*, 771 F.2d 660 (2d Cir. 1985); *United States v. Macchia*, 35 F.3d 662 (2d Cir. 1994); *United States v. Lurz*, 666 F.2d 69 (4th Cir. 1981), *cert. denied*, 459 U.S. 843 (1982); *United States v. MacDougall*, 790 F.2d 1135 (4th Cir. 1986); *United States v. DeFillipo*, 590 F.2d 1228 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979); *United States v. Booth*, 673 F.2d 27 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *United States v. Ruggiero*, 754 F.2d 927 (11th Cir.), *cert. denied*, 471 U.S. 1127 (1985); *United States v. Ingman*, 541 F.2d 1329 (9th Cir. 1976); *United States v. Futch*, 637 F.2d 386 (5th Cir. 1981); *United States v. Sinito*, 723 F.2d 1250 (6th Cir. 1983); *United States v. Tanner*, 860 F.2d 864, 867 (8th Cir. 1988); *United States v. McClelland*, 62 F.3d 265 (8th Cir. 1995).

inadequately protect the defendant from double jeopardy and are not producing similar results. Creating a consistent test will aid the varying jurisdictions in determining what circumstances of an offense are determinative in making a finding of double jeopardy or variance. This will safeguard the Constitutional rights of all defendants faced with the dilemma of multiple versus single conspiracy issues. There is a real need for this Court to create a consistent test to follow and to not allow one rogue factor to be determinative.

When it suits the government's interests to find multiple conspiracies, it is all too easy for courts to depend on certain factors to support that conclusion. When it suits the government's interests to find a single conspiracy, other factors are given precedence. In reality, all factors should be considered, and determination on the totality should be made.

B. Variance

Another place where Double Jeopardy concerns frequently appear in criminal prosecutions is when the government's evidence at trial appears to establish multiple conspiracies as opposed to the single conspiracy alleged in the indictment on which the defendant is being tried. In this case, the defendant raises a variance challenge.[7] In large part, defendants rest their challenges on *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), for the proposition that a conviction

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[7] The rule against variances serves several purposes, one of which "rests on a principle akin to double jeopardy, for the rule helps to minimize the danger that the defendant may be prosecuted a second time for the same offense." *United States v. Schurr*, 775 F.2d 549, 554 (3d Cir. 1985).

for conspiracy should be reversed if the indictment alleges a single conspiracy but the evidence at trial proves multiple conspiracies. In *Kotteakos*, the Court found that the case actually involved eight separate conspiracies with only one of thirty-two defendants common to each. *Id.* at 766. The Court reversed the convictions because the disparity between the size of the alleged conspiracy and the actual conspiracies affected the substantial rights of the defendants. *Id.* at 776. The Court, however, left open the possibility that a more minor variance would not affect a defendant's substantial rights. *Id.* at 764-65.

In addressing these variance challenges, most Circuits have developed a series of factors, similar to double jeopardy challenges, to determine whether a single conspiracy or multiple conspiracies were established. In seven of the Circuits, the existence of a "common goal or plan" is sufficient to establish a single conspiracy.[8] In several others, the existence of

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[8] *United States v. Drougas*, 748 F.2d 8, 17 (1st Cir. 1984)(if the totality of the evidence is adequate to demonstrate that all of the alleged coconspirators directed their efforts towards the accomplishment of a common goal or overall plan, then the existence of a single conspiracy can be found); *United States v. Martino*, 664 F.2d 860, 876 (2d Cir. 1981)("[I]n order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal."); *United States v. Shorter*, 54 F.3d 1248, 1254 (3rd Cir), *cert. denied*, 116 S. Ct. 250 (1995)(If the alleged coconspirators joined together to further a single design or purpose, then there is a single conspiracy); *United States v. Shorter*, 54 F.3d 1248, 1254 (7th Cir.)(If the alleged coconspirators joined together to further a single design or purpose, then there is a single conspiracy); *United States v. Radtke*, 415 F.3d 826, 838 (8th Cir. 2005)("Whether a given case involves single or multiple

a common goal or plan is one of several factors to be considered along with factors such as similarity of participants, the nature of the scheme, and whether the allegedly separate conspiracies are mutually dependent.[9] It is important to look closely at these

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conspiracies depends on whether there was one overall agreement to perform various functions to achieve the objectives of the conspiracy."); *United States v. Kearney*, 560 F.2d 1358, 1362 (9th Cir.), *cert. denied*, 434 U.S. 971, 54 L. Ed. 2d 460, 98 S. Ct. 522 (1977)(The standard for determining the existence of a single conspiracy is whether there was "one overall agreement" among the parties to carry out the objectives of the conspiracy); *United States v. Small*, 423 F.3d 1164, 1184 (10th Cir. 2005)(It is sufficient that a common goal of distributing crack cocaine for profit exists).

[9] *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989) (In order to determine whether a group of individuals engaged in a single conspiracy or multiple conspiracies, three factors are evaluated: (1) "whether there was a common goal among the conspirators"; (2) "whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators"; and (3) "the extent to which the participants overlap in the various dealings."); *United States v. Strickland*, 245 F.3d 368, 385 (4th Cir. 2001)(The question of "[w]hether there is a single conspiracy or multiple conspiracies depends upon the overlap of key actors, methods, and goals."); *United States v. Morrow*, 177 F.3d 272, 291 (5th Cir. 1999)(The principal considerations in counting the number of conspiracies are (1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlapping of the participants in the various dealings); *United States v. Smith*, 320 F.3d 647, 652 (6th Cir. 2003)(The key factors in determining the number of conspiracies "are the existence of a common goal, the nature of the scheme, and the overlapping of the participants in various dealings."); *United States v. Moore*, 525 F.3d 1033, 1042 (11th Cir. 2008)("In determining whether a jury could have found a single conspiracy, this Court considers: (1) whether a common goal existed; (2) the nature of the underlying scheme; and (3) the overlap of participants.").

factors in order to determine how their application overlaps and differs from the application of the "factor" tests in double jeopardy challenges.

The Seventh Circuit has presented an excellent explanation of the concept of mutual dependence:

> But as the government well knows, this [mutual dependence] language is not taken literally. If it were, single conspiracies could not be charged in most cases (which are extraordinarily common) where a wholesaler of illegal drugs deals through more than one dealer, no matter how much each dealer knew about the scope of the operation. As is true of wholesale distribution generally, the viability of wholesale drug trafficking does not depend on the adherence of any single dealer. Lop off one dealer, and the wholesaler can hire another in his place or shift the dealer's allotment of drugs to one or more of his remaining dealers or simply reduce the scale of the drug operation. The dealers are not dependent on each other as a bank robber is dependent on the driver of the getaway car and vice versa. Just as Exxon would not go out of business if it lost one of its retail dealers, so a substantial drug operation would not go out of business because one of its retail dealers left the business.

United States v. Cerro, 775 F.2d 908, 914 (7th Cir. 1985). In the former example, the conspiracies are independent of each other while in the latter, they are mutually dependent. *Id.*

In both Redball I and Redball II, Petitioner was the importer into St. Thomas and the wholesale distributor of the drugs to various locations.

The Fifth Circuit has gone so far as to say, "[w]here members of one enterprise have knowledge, actual or implied, of the existence of members of a related enterprise, and where it is shown that a single "key man" was involved in and directed illegal activities, while various combinations of other defendants exerted individual efforts toward a common goal, a finding of the existence of a single conspiracy is warranted. *United States v. Elam*, 678 F.2d 1234, 1246 (5th Cir. 1982)(citing *United States v. Morado*, 454 F.2d 167 (5th Cir. 1972)). The Eleventh Circuit continues to follow this position as well: "A single conspiracy may be found where there is a "key man' who directs the illegal activities, while various combinations of other people exert individual efforts towards the common goal." *United States v. Gonzalez*, 940 F.2d 1413, 1422 (11th Cir. 1991), *cert. denied*, U.S. , 112 S. Ct. 910, 116 L. Ed. 2d 810, *and cert. denied*, U.S. , 112 S. Ct. 1194, 117 L. Ed. 2d 435 (1992) (citing *United States v. Stitzer*, 785 F.2d 1506, 1518 (11th Cir.), *cert. denied*, 479 U.S. 823, 107 S. Ct. 93, 93 L. Ed. 2d 44 (1986)). Petitioner was the "key man" in the importation and distribution of narcotics in both Redball I and Redball II.

"[C]ourts typically define the common goal element as broadly as possible." *United States v. Moore*, 525 F.3d 1033, 1042 (11th Cir. 2008). "Common" for the purposes of this test means "similar" or "substantially the same" rather than "shared" or "coordinate." *United States v. Calderon*,

127 F.3d 1314, 1327 (11th Cir. 1997). It has also been noted that "in a drug conspiracy, in which the object of the conspiracy is clearly illegal and there are various clandestine functions to perform, the conspirators can be charged with knowledge that others are performing these different functions." *United States v. Chandler*, 388 F.3d 796, 811 n.21 (11th Cir. 2004). Moreover, "[i]t is often possible, especially with drug conspiracies, to divide a single conspiracy into sub-agreements. This does not, however, mean that more than one conspiracy exists. The key is to determine whether the different sub-groups are acting in furtherance of one overarching plan." *Calderon*, 127 F.3d at 1329 (11th Cir. 1997). Redball I and Redball II shared an overarching plan and common goal: buying and selling cocaine for profit. "Buying and selling cocaine for profit" has been identified as a common goal for conspiracy purposes in at least seven (7) Circuits.[10]

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[10] *United States v. Richardson*, 532 F.3d 1279 (11th Cir. Fla. 2008)("the evidence in this case clearly shows a common goal of buying and selling cocaine for profit -- in Atlanta, Miami, and elsewhere"); *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978)(The participants shared a continuing, common goal of buying and selling [drugs] for profit"); *United States v. Tarantino*, 846 F.2d 1384, 1393 (D.C. Cir. 1988)(conspirators often "share a common goal, such as the possession and distribution of narcotics for profit."); *United States v. Russell*, 134 F.3d 171, 182 (3d Cir. 1998) (stating that "the common goal of this conspiracy was to make money selling cocaine"); *United States v. Small*, 423 F.3d 1164, 1184 (10th Cir. 2005)("the evidence was sufficient to show that Green shared the common goal with Small's drug organization of distributing crack cocaine for profit."); *United States v. Fenton*, 367 F.3d 14, 19 (1st Cir. Me. 2004)(defendants "shared the common practice and goal of selling drugs for profit."); *United States v. Arbelaez*, 719 F.2d 1453, 1458 (9th Cir. 1983)(defendants shared a common goal to distribute illicit drugs and make a profit).

It is clear to see in Petitioner's case why the disparity between the application of the two factor tests, both of which are intended to guard against double jeopardy infringement, create an untenable situation in which the government, in the manner of charging, evidence presented, or both, is able to manipulate the tests to the extent that double jeopardy protection is essentially vitiated.

Petitioner's double jeopardy challenge was based on the fact that both Redball I and Redball II alleged a conspiracy to possess with intent to distribute and to import cocaine. The Third Circuit found that, though there was "significant overlap in the locations, time periods, and participants in the two conspiracies," the two conspiracies had different objectives, namely Redball I distributed drugs on the streets of St. Thomas, while Redball II distributed drugs in New York and North Carolina. *United States v. Mark*, 08-1518, A-7). Basically, this appears to Petitioner to come down to the Third Circuit finding the geography of end distribution determinative as evidencing different objectives. However, as presented above, common objectives and goals are often stated in conspiracy cases as the buying and selling of narcotics for profit. The buying and selling of narcotics, received from the same location by Petitioner and subsequently distributed by Petitioner, for profit was the common goal of both Redball I and Redball II. The fact that the drugs were distributed to different locations should be of no moment as all of the drugs were distributed from one central location, the Virgin

Islands, where Petitioner, the "key figure" was located.[11]

The Third Circuit compared Petitioner's case to *United States v. Becker*, 892 F.2d 265 (3rd Cir. 1989), in which two conspiracies were found where one was a conspiracy to grow and distribute marijuana in West Virginia while the second was a conspiracy to smuggle and distribute foreign grown marijuana in Pennsylvania, New Jersey, and Massachusetts. However, in *Becker*, the decision rested on the fact that the West Virginia conviction was entirely based on marijuana being grown on a farm that had never been cultivated or distributed while the Pennsylvania conspiracy concerned distributing, selling and buying marijuana and which involved smuggling it into the country and finding locations where it could be stored.

The Third Circuit also cited *United States v. Chiattello*, 804 F.2d 415 (7th Cir. 1986) to support its position. In *Chiattello*, the defendant was indicted in an Indiana conspiracy that involved the purchase of marijuana in Colombia, the smuggling of the marijuana into the United States, and its subsequent distribution in the Midwest and a Mississippi conspiracy where the defendants were not involved in smuggling but rather thought they were to be purchasers of stolen marijuana in the United States. The Mississippi conspiracy was an

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[11] *United States v. Jabara*, 644 F.2d 574, 577 (6th Cir. 1981)(upholding the district court's determination that a conspiracy indicated in the Eastern District of Michigan was the same conspiracy the defendant had previously been tried for in the Central District of California)

operation of short duration and it was clear that two conspiracies did not depend on each other for success. 804 F.2d 415 at 419. Both Redball I and Redball II depended on Petitioner's importation of cocaine for resale in order for their continued success.

In neither of these cases was the geography of distribution alone significant enough to find that multiple conspiracies existed or had different objectives and, more significantly, there was no indication that there was a common goal between the two conspiracies. Clearly, Redball I and Redball II reflect the elements of a single conspiracy, with only the end location of the drugs differing. By clearing out such minor and inconsequential standards there would be no double jeopardy problems in conspiracy cases. The inconsistent test leads to Constitutional abuses that subvert defendants' double jeopardy rights.

Neither *Blockburger* nor *Kotteokas*, provided guidance to the Circuit courts in applying double jeopardy protections in conspiracy cases. Whether or not a single conspiracy exists should be a consistent interpretation regardless of whether the challenge is brought in the face of a subsequent indictment or on the basis of variance and should not be subject to arbitrary or inconsistent interpretation. The government should not be permitted to carve up a conspiracy into separate pieces and charge them as distinct crimes or lump multiple conspiracies into one on the basis of rogue factors. As a Constitutional protection, it is imperative that defendants be

treated similarly under the law of the United States, regardless of where they are located geographically.

To illustrate the inconsistent application of the factors that apply when there is one conspiracy or more than one, compare two First Circuit cases. In *United States v. Booth*, 673 F.2d 27 (1st Cir. 1982), the defendant was charged with a Florida conspiracy in a Florida district court, and a Maine conspiracy in a Maine district court. The defendant alleged that the separate indictments placed him under double jeopardy, but the Fifth Circuit, examining (1) the time frame (at least six months apart); (2) the number and involvement of the participants (almost half were different); (3) location of overt acts (Florida and Maine); and (4) the object of the conspiracy (intent to distribute marijuana), held that the conspiracies were separate. *Id.* at 29-30. In *United States v. Drougas*, 748 F2d 8 (1st Cir. 1984), the Fifth Circuit upheld the finding of one conspiracy considering (1) the nature of the illegal activity (long-range plan to import drugs), (2) the method of operation (smuggling marijuana by boat to same marina and warehouse), and (3) the scope of conspirator involvement (same core of conspirators). *Id.* at 10-11. The defendants alleged that the acts involved were separate conspiracies and they were each prejudiced by the Government proving them all together; the court held otherwise. *Id.* Both cases occurred in the First Circuit in the early 1980's but they examined different factors, putting emphasis on different facts to arrive at different conclusions in favor of the government's positions.

If the decision in Petitioner's case is permitted to stand, the government is now free to carve up conspiracies and indict them separately based on distribution location and then the question becomes how far away does the distribution have to be to justify the finding of a separate conspiracy. Petitioner respectfully requests that this Honorable Court provide direction to the lower Courts by determining the test to be applied in Double Jeopardy challenges in the determination of one conspiracy or more than one so defendants are not left to flounder in a legal abyss of uncertainty. A specific test would eliminate the continuing abuses of the Double Jeopardy clause allowing all courts to apply a consistent test to the evidence and not simply using a rogue factor for the convenience of the case or forum.

CONCLUSION

The aforementioned error creates a serious question of confidence in the outcome of Petitioner's prosecution, conviction, and sentence. If confidence in the outcome of a judicial proceeding is questioned, the matter should be remanded for further proceedings. To do anything different would be a miscarriage of justice.

WHEREFORE, Petitioner prays this Honorable Court will grant the present request, and grant the Writ of Certiorari, or, in the alternative, the COA.

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APPENDIX

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1518

UNITED STATES OF AMERICA

v.

GELEAN MARK,

Appellant

Appeal from the District Court
of the Virgin Islands
(No. 05-cr-0076)
District Judge: Hon. Curtis V. Gomez

Argued May 8, 2008
Before: RENDELL, FUENTES, and CHAGARES,
Circuit Judges.
(Filed: July 8, 2008)
[Entered: July 8, 2008]

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OPINION OF THE COURT

CHAGARES, Circuit Judge.

Gelean Mark (Mark) appeals from the District Court's denial of his motion to dismiss an indictment on double jeopardy grounds. Mark contends that the drug conspiracies alleged in two separate indictments were actually a single agreement. because the two alleged conspiracies had different objectives, we conclude that they are distinct and will affirm the District Court's decision.

I.

On October 6, 2005, a grand jury in the Virgin Islands charged Mark, Vernon Fagan (Fagan), Walter Ells (Ells), and others in an 18-count indictment, hereinafter referred to as "Redball I."[1]

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[1] Count I of the Redball I indictment charged:

Beginning from a time unknown, but no later than November 2004, and continuing until November 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants, Gelean Mark, Vernon Fagan, . . . did knowingly and intentionally, combine, conspire, confederate and agree together and with each other and with diverse other persons to the grand jury known and unknown, . . . to knowingly and intentionally possess with intent to distribute controlled

(... continued on next page)

The indictment charged the defendants with conspiracy to possess and distribute cocaine, cocaine base, and marijuana, and conspiracy to import cocaine and cocaine base. While Redball I was pending before the United States District Court for the Virgin Islands, the grand jury returned a separate 14-count indictment on December 19, 2006, naming Mark, Fagan, Ells, and others as defendants. This indictment, hereinafter referred to as "Redball II," alleged conspiracy to possess and distribute cocaine and conspiracy to import cocaine.[2]

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substances, namely five (5) kilograms and more of a mixture and substance containing a detectable amount of cocaine, . . . fifty (50) grams and more of a mixture or substance containing a detectable amount of cocaine base, . . . and less than fifty (50) kilograms of marijuana . . . .

App. 48-49. Count XVIII of the Redball I indictment charged:

Beginning from a time unknown, but no later than November 2004, and continuing until October 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, the defendants, Gelean Mark, Vernon Fagan, . . . did knowingly and intentionally conspire, confederate, and agree together and with each other . . . to import controlled substances into the United States from a place outside thereof, namely five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, . . . and fifty (50) grams or more of a mixture or substance containing a detectable amount of cocaine base . . . .

App. 53.

[2] Count I of the Redball II indictment charged:

Beginning from a time unknown, but no later than 1999, and continuing until October 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark, Walter Ells, Vernon Fagan . . . and Dorian Swan, did knowingly and intentionally, combine, conspire, confederate,

(... continued on next page)

The jury trial in Redball I began on March 5, 2007 and ended in a mistrial on March 27, 2007 due to a deadlocked jury. The jury trial in Redball II began on September 5, 2007. The jury returned a partial verdict of guilty with respect to Mark and co-defendant Henry Freeman on Count I of the Redball II indictment, and the trial judge declared a mistrial on the remaining Redball II counts and defendants on October 1, 2007. On January 28, 2008, Mark filed a motion to dismiss Counts I and XVIII of the Redball I indictment, contending that, given his conviction on Count I in Redball II, reprosecution of the conspiracy counts in the Redball I indictment would violate his double jeopardy rights. The District Court denied his motion, and this appeal followed. We have jurisdiction to review this appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. See Abney v. United States, 431 U.S. 651,

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and agree together with each other and with diverse other parties known and unknown, . . . to knowingly and intentionally possess with intent to distribute a controlled substance, namely five (5) kilograms or more of a mixture and substance containing a detectable amount of cocaine . . . .

App. 60-61. Count II of the Redball II indictment charged:

> Beginning from a time unknown, but no later than 1999, and continuing until October 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants, Gelean Mark, Walter Ells, and Vernon Fagan, did knowingly and intentionally conspire, confederate, and agree with each other and with other persons known and unknown . . . to import into the United States from a place outside thereof, namely Tortola, British Virgin Islands, controlled substances, namely five kilograms and more of a mixture and substance containing a detectable amount of cocaine . . . .

App. 66.

659 (1977); United States v. Venable, 585 F.2d 71, 74 (3d Cir. 1978). "Our review of double jeopardy challenges is plenary." United States v. Smith, 82 F.3d 1261, 1265 (3d Cir. 1996).

II.

In this appeal, we must decide whether Mark's conspiracy conviction in Redball II bars retrial in Redball I under the double jeopardy clause. See U.S. Const. amend. V, cl. 2. A defendant moving to dismiss an indictment on double jeopardy grounds bears the evidentiary burden of going forward by putting his double jeopardy claim in issue. If the defendant presents a non-frivolous showing of double jeopardy, he is entitled to a pre-trial evidentiary hearing to determine the merits of his claim. Once the defendant has established his prima facie case, the burden of persuasion shifts to the Government to prove by a preponderance of the evidence that the two indictments charge the defendant with legally distinct crimes. See Smith, 82 F.3d at 1266.

The double jeopardy clause prevents the Government from splitting one conspiracy into multiple prosecutions. See Braverman v. United States, 317 U.S. 49, 63 (1942). Generally, the same evidence test is utilized to determine whether a second prosecution is barred. Blockburger v. United States, 284 U.S. 299 (1932) (holding that test for whether two offenses are not the same is whether each offense requires proof of a fact that the other does not). When the charge involves a conspiracy, however, this Court applies a "totality of the circumstances" test as established in United States v. Liotard, 817 F.2d 1074, 1078 (3d Cir. 1987). This

is because "successive indictments against a single defendant for participation in a single conspiracy might withstand same evidence scrutiny if the court places undue emphasis upon the evidence used to prove the commission of the overt acts alleged," id. at 1078, and with a conspiracy, "it is the agreement which constitutes the crime, not the overt acts." Id. (quoting United States v. Young, 503 F.2d 1072, 1076 (3d Cir. 1974)). The "ultimate inquiry presented by conspiracy double jeopardy claims is whether there are two agreements or only one." Smith, 82 F.3d at 1267. See also United States v. Becker, 892 F.2d 265, 268 (3d Cir. 1989) ("The critical determination is whether one agreement existed.")

In order to determine whether one or more agreements existed, Liotard's totality of the circumstances test instructs us to examine four factors: (1) the "locus criminis" of the alleged conspiracies[3]; (2) the degree of temporal overlap between the conspiracies; (3) the overlap of personnel between the conspiracies, including unindicted co-conspirators; and (4) the similarity in the overt acts charged and role played by the defendant in each indictment. Liotard, 817 F.2d at 1077. These factors should not be rigidly applied, as "different conspiracies may warrant emphasizing different factors." Smith, 82 F.3d at 1267. The goal is to determine "whether the overt acts alleged in the first conspiracy charge were carried out in

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3 "'Locus criminis' is defined very simply 3 as the 'locality of a crime; the place where a crime was committed.'" Smith, 82 F.3d at 1268 (citation omitted).

furtherance of the broad agreement alleged in the second indictment or whether these acts were carried out in furtherance of a different agreement." Liotard, 817 F.2d at 1078 (quotation and citation omitted).

III.

Mark is correct in his assertion that there is significant overlap in the locations, time periods, and participants in the two conspiracies alleged in this case. However, we find it determinative that the conspiracies had different objectives. As the District Court concluded, the conspiracy alleged in Redball I aimed "to possess large quantities of cocaine, crack, and marijuana with intent to distribute the drugs on the streets of St. Thomas for financial gain," App. 17, while the goal of the conspiracy alleged in Redball II was "to possess large quantities of cocaine for distribution in New York and North Carolina for financial gain." Id. at 18. In Becker, this Court compared a conspiracy to grow and distribute marijuana with a conspiracy to smuggle and distribute foreign-grown marijuana. The defendant in Becker was convicted in Pennsylvania of conspiracy to possess with intent to distribute marijuana in Pennsylvania, New Jersey, and Massachusetts. He argued that a prior conviction in West Virginia for conspiracy to manufacture and distribute marijuana barred the Pennsylvania conviction. The time periods alleged in the two indictments overlapped, but this Court found it crucial that while the object of the West Virginia conspiracy had been to manufacture and possess with intent to distribute, the Pennsylvania indictment charged that the objects of that

conspiracy were to smuggle, store, and distribute marijuana. Consequently, "[t]hese were two different objectives" and "hence two conspiracies." 892 F.2d at 268. Likewise, the substantive objectives of the two conspiracies here are distinct and reveal two agreements. Redball I alleged a conspiracy involving a street-level operation in St. Thomas distributing cocaine, crack cocaine, and marijuana, while Redball II alleged a conspiracy to import cocaine from the British Virgin Islands for subsequent distribution in the continental United States. See also United States v. Chiattello, 804 F.2d 415 (7th Cir. 1986) (holding that two conspiracies existed where the first indictment was for a conspiracy to buy marijuana in Mississippi and the second indictment involved a scheme to smuggle marijuana from Colombia and distribute it in Indiana). Accordingly, Mark has not made the requisite double jeopardy showing and may be retried in Redball I.

IV.

For the foregoing reasons, we will affirm the decision of the District Court.

FOR PUBLICATION

IN THE DISTRICT COURT OF
THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)
Plaintiff,	)
v.	)
GELEAN MARK,	)
VERNON FAGAN,	)
ALAN DINZEY,	)
ALEXCI EMMANUEL,	)
LEON BOODOO, and	)
SHAKIMA ALEXANDER,	)
Defendants.	)
	)

Criminal No. 2005-76

[Entered: February 15, 2008]

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For defendant Shakima Alexander.

MEMORANDUM OPINION

GÓMEZ, C.J.

Before the Court is the motion of Gelean Mark ("Mark"), joined by Vernon Fagan ("Fagan"), to dismiss the indictment in this matter on grounds that prosecution of the charges therein would violate the Double Jeopardy clause of the Fifth Amendment of the United States Constitution ("Double Jeopardy"). For the reasons stated below, the Court will deny the motions.

I. FACTS

On October 6, 2005, the grand jury returned the original indictment in the above-captioned matter (hereinafter referred to as, "Redball One") against Mark, Fagan, and co-defendants Alan Dinzey ("Dinzey"), Alexci Emmanuel ("Emmanuel"), Leon Boodoo ("Boodoo"), and Shakima Alexander ("Alexander") (collectively, the "Redball One Defendants"). Thereafter, the grand jury returned a superseding indictment, and, on December 19, 2006, a second superseding indictment (the "Redball One Indictment").

Count One of the Redball One Indictment states:

> Beginning from a time unknown, but no later than November 2004, and continuing until November 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark, Vernon Fagan, aka "Culture," . . . did knowingly and intentionally, combine, conspire, confederate, and agree together with each other and with diverse other persons to the grand jury known and unknown, . . . to knowingly and intentionally possess with intent to distribute controlled substances . . . .

(Second Superceding Indictment 1-2, Crim. No. 2005-76, Dec. 19, 2006.). The controlled substances underlying the conspiracy in Count One included cocaine, cocaine base ("crack"), and marijuana. Count Eighteen of the indictment in Redball One states:

> Beginning from a time unknown, but no later than November 2004, and continuing until November 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark [and] . . . Vernon Fagan . . . did knowingly and intentionally, combine, conspire, confederate, and agree together with each other . . . to import controlled substances into the United States from a place outside thereof . . . .

(*Id.* at 8.) The conspiracy charged in Count Eighteen involved the importation of cocaine and crack.

Also on December 19, 2006, the government filed a separate indictment in this Court against Mark, Fagan, and seven other codefendants, in a matter given Criminal No. 2006-80 (hereinafter, "Redball Two"). Count One of the indictment filed in Redball Two alleges:

> Beginning from a time unknown, but no later than 1999, and continuing until October, 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark [and] . . . Vernon Fagan . . . did knowingly and intentionally, combine, conspire, confederate, and agree together with each other and with diverse other persons to the grand jury known and unknown, . . . to knowingly and intentionally possess with intent to distribute a controlled substance . . .

(Indictment 1-2, Crim. No. 2006-80, Dec. 19, 2006.) Count Two of the Redball Two indictment states:

> Beginning from a time unknown, but no later than 1999, and continuing until October 2005, at St. Thomas in the District of the Virgin Islands and elsewhere, defendants Gelean Mark [and] Vernon Fagan did knowingly and intentionally, combine, conspire, confederate, and agree together with each other and with other persons known and unknown to the grand jury . . . to knowingly and intentionally import into the United States from . . . Tortola, British Virgin Islands, controlled substances . . . .

(*Id.* at 7.) The only controlled substance allegedly involved in Redball Two was cocaine.

The trial in Redball One was conducted from March 5, 2007, through March 27, 2007. The parties rested and the matter went to the jury after approximately three weeks of trial. During the second day of deliberations, the jury sent the Court a note indicating they were deadlocked and could not reach a unanimous verdict with respect to the defendants on Counts One and Eighteen of the Indictment. After consulting with counsel, the Court instructed the jury to deliberate further (the "*Allen* charge"), consistent with *Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 935-36 (3d Cir. 1974). The jury deliberated for one more day. The Court then received another note indicating that the jury was still unable to reach a unanimous verdict on Counts One and Eighteen.

On March 27, 2007, the Court declared a mistrial in Redball One.[1] The Court found that manifest necessity required such a declaration, given that the jury was unable to reach a unanimous verdict on Counts One and Eighteen. Thereafter, defendant Dinzey moved to dismiss the Redball One Indictment on Double Jeopardy grounds. In an Order entered April 10, 2007, the Court denied Dinzey's motion to dismiss. On April 13, 2007, Dinzey appealed the Court's April 10, 2007, Order denying his motion to dismiss the Redball One Indictment. The trial in Redball Two took place between September 5, 2007, through October, 3 2007. The parties rested and the matter went to the jury during the fourth week of

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[1] On March 29, 2007, the Court entered a written Order memorializing the March 27, 2007, verbal order declaring a mistrial.

trial. After approximately three days of deliberation, the jury sent the Court a note indicating they were deadlocked and could not reach a unanimous verdict with respect to four of the defendants in Count One of the Indictment. The jury also disclosed that they could not reach a unanimous verdict as to any defendant named in Counts Two and Fourteen. After consulting with counsel, the Court gave the jury an "*Allen* charge," similar to the instruction given after the deadlock was announced in Redball One.

On October 1, 2007, the jury returned a partial verdict of guilty with respect to Mark and co-defendant Henry Freeman ("Freeman") on Count One. After approximately one and a half hours of further deliberations, the jury sent another note to the Court indicating that they were still unable to reach a unanimous verdict with respect to Fagan and his co-defendants on Count One, and on Counts Two and Fourteen. The Court again conferred with counsel and discussed suggestions on how to proceed in light of the jury's inability to reach a unanimous verdict as to Fagan and the three other co-defendants on Count One, and on Counts Two and Fourteen. On October 3, 2007, the Court declared a mistrial as to Fagan and three other co-defendants in Counts One; as to Mark, Fagan, and another co-defendant in Count Two; and as to Mark in Count Fourteen.[2] As in Redball One, the Court found that manifest necessity required such a declaration in

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[2] On October 11, 2007, the Court entered a written Order memorializing its October 3, 2007, verbal order finding manifest necessity to declare a mistrial.

Redball Two, given the jury's inability to reach a unanimous verdict on those charges.

On January 11, 2008, the Third Circuit issued its mandate dismissing the appeal in Redball One. On January 17, 2008, defendant Dorian Swan ("Swan") moved to dismiss the Redball Two Indictment on Double Jeopardy grounds, which was joined by Mark. On January 20, 2008, the Court entered an Order denying the motion to dismiss. On January 21, 2008, Mark and Swan filed notices of appeal of the Court's January 20, 2008, Order denying the motion to dismiss. On the morning of January 22, 2008, the day on which the retrial in Redball Two was scheduled to commence, the Court entered an Order specifically finding the motion to dismiss to be frivolous and dilatory. In the afternoon of January 22, 2008, the Third Circuit issued an order staying the trial as to all of the defendants in Redball Two.

The re-trial of Redball One is scheduled to commence on February 25, 2008.

Now, Mark moves to dismiss Counts One and Eighteen of the Redball One Indictment on Double Jeopardy grounds.

II. DISCUSSION

The Double Jeopardy Clause protects criminal defendants from later prosecutions for the same offense. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."). In a jury trial, Double Jeopardy rights do not attach until the jury is empaneled and sworn. *Gómez v. United States,* 490 U.S. 858 (1989). However, the Double Jeopardy

Clause will not bar successive prosecutions for the same offense where a mistrial is required by "manifest necessity." *United States v. Rivera*, 384 F.3d 49, 53 (3d Cir. 1991); *see also United States v. Console*, 13 F.3d 641, 663-64 (3d Cir. 1993) (explaining that Double Jeopardy will not bar the reprosecution unless the issue has been "necessarily determined in the defendant's favor by a valid and final judgment").

III. ANALYSIS

Mark and Fagan argue that dismissal of Counts One and Eighteen of the Redball One Indictment is appropriate because the Double Jeopardy clause prohibits re-prosecution of those Counts.

A. Mark

1. Count One

Mark first asserts that indictments in Redball One and Redball Two allege the same conspiracies. Mark contends that, in light of his October 1, 2007, conviction on Count One of the Redball Two Indictment, re-trial of Count One of the Redball One Indictment would violate the Double Jeopardy clause. Although the "same evidence"[3] test ordinarily

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[3] Under the "same evidence" test, "a court inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *United States v. Watkins*, 339 F.3d 167, 176 (3d Cir. 2003); *see also United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985) (explaining that Double Jeopardy will normally prohibit re-trial if "the two offenses charged are in law and in fact the same offense"); *cf. United States v. Felix*, 503 U.S. 378, 387, 112 S. Ct. 1377, 118 L. Ed.2d 25 (1992) ("[A] mere overlap in proof

(... continued on next page)

determines whether Double Jeopardy bars successive criminal prosecutions, in conspiracy cases such test, "may not adequately protect the defendant's constitutional right against double jeopardy, unless it is tempered . . . with the consideration that a single conspiracy may not be arbitrarily subdivided for the purposes of prosecution." *United States v. Liotard*, 817 F.2d 1074, 1078 (3d Cir. 1987) (citations and quotations omitted); *see also United States v. Smith*, 82 F.3d 1261, 1267 (3d Cir. 1996) ("We must not allow the double jeopardy clause to be subverted by artful pleading or by the selective and strategic reservation of evidence in one prosecution so that it can be used in a subsequent one premised upon the same agreement."); *United States v. Becker*, 892 F.2d 265, 268 (3d Cir. 1989) ("[T]he double jeopardy clause prohibits it from splitting one conspiracy into several prosecutions."). "The danger is that successive indictments against a single defendant for participation in a single conspiracy might withstand same evidence scrutiny if the court places undue emphasis upon the evidence used to prove the commission of the overt acts alleged." *Liotard*, 817 F.2d at 1078. Indeed, "[d]ifferent alleged overt acts are not necessarily inconsistent with an improper division of a single conspiracy into multiple crimes. It is the agreement which constitutes the crime, not the overt acts . . . .". *United States v. Young*, 503 F.2d 1072, 1075 (3d Cir. 1974); *see also United States v. Pressler*, 256 F.3d 144, 147 (3d Cir. 2001) (recognizing that the essence of any conspiracy is the

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between two prosecutions does not establish a double jeopardy violation.").

agreement); *Becker*, 892 F.2d at 268 ("The critical determination is whether one agreement existed."). Courts apply a "totality of the circumstances" test to Double Jeopardy claims involving successive conspiracy indictments to emphasize the agreements over the overt acts alleged furtherance of the conspiracies charged. *See Smith*, 82 F.3d at 1271; *Becker*, 892 F.2d at 268; *Liotard*, 817 F.2d at 1077-78.

Under this standard, Double Jeopardy bars re-trial on drug conspiracy charges if the "totality of the circumstances" demonstrates that the conspiracies alleged in successive indictments are actually a single agreement. *See Smith*, 82 F.3d at 1267 ("[T]he fact that the Kentucky indictment here alleges a conspiracy to commit mail fraud while the New Jersey one alleges a conspiracy to transport in interstate commerce the proceeds of a fraud is wholly unimportant if the evidence indicates that there was but one agreement to defraud [a company] utilizing both the mails and the interstate transportation of funds."); *Liotard*, 817 F.2d at 1077-78 ("Proper weight must be given to consideration of whether the overt acts alleged in the first conspiracy charge were carried out in furtherance of the broad agreement alleged in the second indictment or whether these acts were carried out in furtherance of a different agreement." (citations and quotations omitted)).

In determining whether the government has alleged one or more agreements under the "totality of the circumstances" test, it is appropriate to consider the following four factors: "(a) the *'locus*

criminis[4] of the alleged conspiracies; (b) the degree of temporal overlap between the conspiracies; (c) the overlap of personnel between the conspiracies, including unindicted co-conspirators; and (d) the similarity in the overt acts charged and role played by the defendant in each indictment." *Smith*, 82 F.3d at 1267-68 ("[W]e must look to the entire record before the district court in examining the totality of the circumstances to determine if the conspiracies alleged in the two indictments truly are different agreements."). "The ultimate purpose of the totality of the circumstances inquiry is to determine whether two groups of conspirators alleged by the government to have entered separate agreements are actually all committed to the same set of objectives in a single conspiracy." *Id.* at 1271.

If the defendant makes the requisite showing of interdependence with respect to the above four factors, "he is entitled to a pretrial evidentiary hearing to adjudicate his double jeopardy claim." *Id.*

Here, the *locus criminis* of the conspiracy charged in Count One of the Redball One Indictment and in Count One of the Redball Two Indictment is "the District of the Virgin Islands and elsewhere." (Second Superseding Indictment 1, Crim. No. 2005-76, Dec. 19, 2006.); (Indictment 1, Crim. No. 2006-80, Dec. 19, 2006.) The conspiracy charged in Count One of Redball One allegedly occurred from November, 2004, through November, 2005. The conspiracy charged in Count One of the Redball Two Indictment spanned from approximately 1999, until

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[4] The term "*locus criminis*" means "[t]he place where a crime was committed." *Black's Law Dictionary* (8th ed. 2004).

October, 2005. Aside from Mark and Fagan, none of the co-defendants named in the Redball One Indictment were also named in the Redball Two Indictment. Regarding overlap between unindicted co-conspirators, Elton Turnbull ("Turnbull") testified during the trials of Redball One and Redball Two regarding his participation in the conspiracies to possess with intent to distribute alleged in both indictments. Walter Ells ("Ells") was named as a defendant in the original indictment filed in Redball One, but was dropped from this matter on December 19, 2006, when he was indicted in Redball Two. Both indictments allege that Mark's role was that of a "leader" who "controll[ed], orchestrate[d], and supervise[d] the importation and distribution of the [controlled substances]." (Second Superseding Indictment 3, Crim. No. 2005-76, Dec. 19, 2006.); (Indictment 3, Crim. No. 2006-80, Dec. 19, 2006.)

Notwithstanding the overlap in the locations, time periods, objectives, and some of the participants, the conspiracies alleged in Count One of the successive Redball indictments have different objectives. The purported goal of the conspiracy charged in Count One of Redball One was to possess large quantities of cocaine, crack, and marijuana with intent to distribute the drugs on the streets of St. Thomas for financial gain. "Most often, the members of the conspiracy imported the drugs from outside the territory of the Virgin Islands, packaged the drugs for individual sale, and distributed the same in the Savan area of St. Thomas, U.S. Virgin Islands." (Second Superseding Indictment 2, Dec. 19, 2006.) On the other hand, the goal of the conspiracy charged in Count One of Redball Two was to possess large quantities of cocaine for distribution in New

York and North Carolina for financial gain. "Most often, the members of the conspiracy imported the drugs from outside the territory of the Virgin Islands, and distributed the same through the Cyril E. King Airport on various aircrafts for distribution within various states in the mainland United States." (Indictment 2, Dec. 19, 2006.)

Because Count One of Redball One and Count One of Redball Two allege different agreements with different objectives, Double Jeopardy will not bar the re-trial of Count One of Redball One. *See, e.g., United States v. Becker*, 892 F.2d 265, 268 (3d Cir. 1989) (holding that a temporal overlap alone did not show a single conspiracy for Double Jeopardy purposes because the successive indictments alleged "two different objectives and agreements, and hence two conspiracies"). Indeed, it is readily apparent from the face of the successive indictments in this matter, as well as the evidence adduced during the trials, that Count One of Redball One and Count One of Redball Two alleged different conspiracies. Accordingly, the Court finds Mark's motion to dismiss Count One of Redball One to be frivolous. *United States v. Smith*, 82 F.3d 1261, 1271-72 (3d Cir. 1996) ("Having considered the totality of circumstances . . . we conclude that [the defendant] has failed to make a non-frivolous showing because there is nothing in the record that suggests that the New Jersey defendants and Kentucky defendants are tied together into a single conspiracy by a commitment to a single set of objectives.").

2. Count Eighteen

Additionally, Mark claims that Count Eighteen of Redball One charges the same conspiracy as Count Two of the Redball Two. He asserts that there was no manifest necessity to warrant the Court's declaration of a mistrial as to Counts Two of the Redball Two Indictment. Mark contends that Double Jeopardy bars re-trial of Count Eighteen of the Redball One Indictment.

It is true that Double jeopardy bars successive prosecutions where "the two offenses charged are in law and in fact the same offense." *United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985). However, the Double Jeopardy Clause will not bar successive prosecutions for the same offense where a mistrial is required by "manifest necessity." *United States v. Rivera*, 384 F.3d 49, 53 (3d Cir. 1991); *see also United States v. Console*, 13 F.3d 641, 663-64 (3d Cir. 1993) (explaining that Double Jeopardy will not bar re-prosecution unless the issue has been "necessarily determined in the defendant's favor by a valid and final judgment"). Manifest necessity is present when the circumstances leave the trial judge with "no alternative to the declaration of a mistrial. The trial judge must consider and exhaust all other possibilities." *Love v. Morton*, 112 F.3d 131, 137 (3d Cir. 1997) (citing *United States v. McKoy*, 591 F.2d 218, 222 (3d Cir. 1979)).

As explained in the January 20, 2008, Order denying Mark's motion to dismiss the Redball Two Indictment on Double Jeopardy grounds, the Court has previously found that manifest necessity required the declaration of a mistrial as to Count

Two in Redball Two. *See* (Order 4-5, Jan. 20, 2008.).[5] Even assuming the successive Redball indictments alleged the same conspiracies, it is axiomatic that re-trial of Mark in Count Eighteen of Redball One would not be barred, as Mark was neither convicted nor acquitted of the remaining charges in Redball One or Redball Two. *See, e.g., Console*, 13 F.3d at 664-65 ("[I]nasmuch as a response to a special interrogatory regarding an element of a "hung" count is neither a "final" judgment nor a determination "necessary" to a final judgment, such a response would not preclude the government from relitigating"); *see also United States ex rel. Russo v. Superior Court of New Jersey*, 483 F.2d 7, 13 (3d Cir. 1973) ("'Manifest necessity' must be present ... for a trial judge to declare a mistrial and still preserve for the state the right to reprosecute a defendant."). Because that conclusion is obvious given the attendant facts and minimal research efforts, the Court finds that Mark's motion to dismiss Count Eighteen is frivolous.

B. Fagan

Fagan was not convicted or acquitted of any charges in Redball One or Redball Two. He joins in Marks motion to dismiss on grounds that the mistrial in Redball Two was not required by

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[5] As of the date of this Memorandum Opinion, the appeal of the Court's January 20, 2008, Order finding that manifest necessity required the mistrial as to Count Two of Redball Two is currently pending before the United States Court of Appeals for the Third Circuit. The validity of the Court's manifest necessity determination dictates whether Double Jeopardy will bar re-trial of Count Eighteen of the Redball One Indictment, as well as Count Two of the Redball Two Indictment.

manifest necessity. As explained above, this Court has found that manifest necessity supported the declaration of a mistrial in Redball Two. For the reasons explained above with respect to the re-trial of Mark on Count Eighteen, Double Jeopardy does not bar the re-trial of Fagan on Counts One or Eighteen of this matter. Like Mark's motion to dismiss Count Eighteen, the Court also finds Fagan's motion to dismiss Counts One and Eighteen to be frivolous.

IV. CONCLUSION

For the foregoing reasons, the Court will deny Mark's motion to dismiss Counts One and Eighteen of this matter. The Court will also deny Fagan's motion to dismiss Counts One and Eighteen this matter. An appropriate Order follows.

DATED: February 15, 2008

S\ CURTIS V. GÓMEZ
Chief Judge

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FOR PUBLICATION
IN THE DISTRICT COURT OF
THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)
Plaintiff,	)
v.	)
GELEAN MARK,	)
VERNON FAGAN,	)
ALAN DINZEY,	)
ALEXCI EMMANUEL,	)
LEON BOODOO, and	)
SHAKIMA ALEXANDER,	)
Defendants.	)
	)

Criminal No. 2005-76

[Entered: February 15, 2008]

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ORDER

GÓMEZ, C.J.

Before the Court is the motion of Gelean Mark ("Mark"), joined by Vernon Fagan ("Fagan"), to dismiss the indictment in this matter on grounds that re-trial would violate the Double Jeopardy clause of the Fifth Amendment of the United States Constitution ("Double Jeopardy"). For the reasons stated in the Memorandum Opinion of even date, it is hereby

ORDERED that the motions of Mark and Fagan are DENIED.

DATED: February 15, 2008

S\ CURTIS V. GÓMEZ
Chief Judge

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